

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
APPENDIX**

77-1105

In The
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

B

DOCKET NO. 77-1105

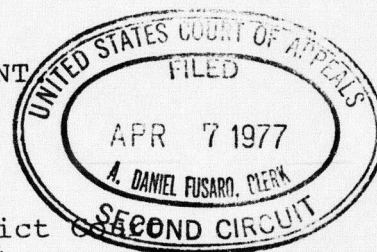
UNITED STATES OF AMERICA,

APPELLEE,

-VS-

DAVID DANIEL EVANS,

APPELLANT



On Appeal From The United States District Court
For The District of Connecticut

APPENDIX TO BRIEF FOR APPELLANT
DAVID DANIEL EVANS

ALSO ON BRIEF:

PETER GOLDBERGER
ASST. FEDERAL PUBLIC DEFENDER

ANDREW B. BOWMAN
FEDERAL PUBLIC DEFENDER
770 CHAPEL STREET
NEW HAVEN, CONNECTICUT 06510
(FTS) 8-643-8148
ATTORNEY FOR APPELLANT

PAGINATION AS IN ORIGINAL COPY

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11 16-76-145

1

U.S. DISTRICT COURT 18:

OFFENSES CHARGED

ORIGINAL COUNTY

2113(a) Did steal money belonging to and in the care, custody, control, management and possession of the First Bank (Counts I, III, V)

18:2113(b) Did take and carry away with intent to steal, money in excess of \$100.00 belonging to and in the care, of the First Bank (Counts II, IV & VI)

II. KEY DATES & INTERVALS

ARREST or	INDICTMENT X	ARRAIGNMENT	TRIAL	SENTENCE
U.S. Custody Bureau	High Risk Date: 11/16/76	11.23.76	1/3/77	1/11/77
Summons Served	Indictment Waived	11/23/76	1/3/77	2/14/77
First Appearance	Indictment Waived	1/11/77	1/3/77	

SEARCH WARRANT	DATE	INITIAL NO	INITIAL APPEARANCE DATE	INITIAL NO	OUTCOME
Issued	11/16/76				
Returned					
Summons Issued					
Served					
Arrest Warrant Issued					
COMPLAINT					
OFFENSE (In Complaint)					

U.S. Attorney or Asst

Peter C. Dorsey

Peter Clark

Hugh Cuthbertson

ATTORNEYS

Andrew B. Bowman

770 Chapel Street, New Haven, Conn.

1976

DATE	DOCUMENT NO	PROCEEDINGS	EXCLUDABLE DELAY
11/16		Indictment returned at Hartford and filed in New Haven. Bench warrant to issue and lodge as detainer.	(a) (b) (c) (d)
11/17		Bench warrant issued and handed to U.S. Marshal for service.	
11/19		Application for Writ of H.C. ad Prosequendum, filed by govt. and allowed. Newman, J. m-11/22/76. Two cert. copies handed to U.S. Marshal for service.	
11/23		PLEA: Financial Affidavit, filed by deft. Court appoints Public Defender. Plea of not guilty entered to Cts. one through six. Govt. moves to have bond set in the amt. of \$100,000.00 w/ surety. Case continued on bond of \$20,000.00 w/surety for trial on 1/3/77. Matter of bond can be reviewed at a later date, if requested by either side. Newman, J. m-11/23/76.	

A

DATE
1976

IV. JUDICIAL OFFICES II. MINUTES

PAGE TWO

V. EXCLUDABLE DELAY

		(a)	(b)	(c)	(d)
11/23	Hearing held on Govt motion to have deft. submit to major case prints and provide handwriting exemplars. Deft. request until Friday to file brief in opposition-granted. Court instructs the deft. to provide the fingerprints and the handwriting exemplars to the special agents after which they are to be turned over to the Clerk and to be retained by the Clerk until a ruling is made in this matter. 4:10 P.M. Govt. moves for an order to show cause why the deft. should not be held in contempt for failure to provide handwriting exemplars and fingerprints. Court hears argument in opposition. Deft. given until Friday to file any opposing brief. Hearing to be held on govt's application for and Order compelling the deft. to provide fingerprints and handwriting exemplars. Govt. to provide proposed order. Hearing to be held on 11/29/76 at 10:00 A.M.. Newman, J. m-11/23/76.	3	11/23/76	E	
		3	11/23/76	E	1
11/24	Notice of Readiness, filed by govt.				
11/26	Marshal's return showing service, filed: Writ of H.C. ad Prosequendum.				
11/26	Deft's Memorandum In Opposition to Govt's Request for Palm Print and Handwriting, filed by deft.				
11/29	CJA Form D appointing the Federal Public Defender to Represent the deft, filed. Newman, J. m-11/29/76. copies mailed to counsel.				
"	Hearing held on Govt. Application for and Order Compelling fingerprints and handwriting exemplars. Motion to Compel Major Case fingerprints and handwriting exemplars, filed by govt and granted. Court executes proposed order and explains the order to deft and the consequences of non-compliance. Order, filed and entered. Newman, J. m-11/29/76. copies of Order mailed to counsel.	3	11/29/76	E	
		3	11/29/76	E	1
11/30	Hearing on Govt's Supplemental Order re: exemplars. Supplemental Order-denied orally. Newman, J. m-11/30/76.	3	11/30/76	E	
" "	Motion for Order to Show Cause Why the Deft. Should not be held in Criminal Contempt, Affidavit in Support of Motion for Order to Show Cause, filed by govt..	3	11/30/76	E1	
11/29	Court Reporter's Notes of Proceedings (Plea) held on Nov. 23, 1976, filed. Gale, R.				

DATE	RECEIPT NUMBER	DATE	RECEIPT NUMBER	DATE	RECEIPT NUMBER

DATE 1976	PROCEEDINGS (continued) (Document No.)	V. EXCLUDABLE DELAY			
		(a)	(b)	(c)	(d)
11/30	Order Granting Motion to Show Cause Why the Deft. Should Not be Held in Criminal Contempt, filed and entered. Hearing to be held on 12/2/76 at 9:30 A.M.. Newman, J. m-12/1/76. copies mailed to counsel and two cert. copies handed to U.S. Marshal for service.				
12/1	Court Reporter's Notes of Proceedings (hearing) held on Nov. 30, 1976, filed. Gale, R.				
12/1	Hearing scheduled for Dec. 2, 1976 on Order Granting Motion to Show Cause Why the Deft. Should not be held in Criminal Contempt over to Dec. 3, 1976 at 9:30 A. M.. Newman, J. m-12/1/76				
12/3	Hearing held on Motion to Show Cause Why the Deft. Should Not be Held in Criminal Contempt. Govt. witness sworn and testified. 10:02 A. M. Both sides rest. Court rules that deft is in contempt of the Court's Order of 11/29/76 and is in criminal contempt and is so adjudicated. Court will defer imposition of a penalty until the disposition of this case. Newman, J. m-12/3/76.	3	12/3/76	E	
		3	12/3/76	E	1
12/7	Court Reporter's Notes of Proceedings (OSC) held on 12/3/76, filed. Gale, R.				
12/7	Marshal's return showing service, filed: OSC.				
12/14	Motion for Notice of Alibi, filed by govt.	3	12/14/76	G	
12/20	Objection to Govt's Motion for Notice of Alibi and Deft's Motion for Protective Order, filed by deft.				
12/28	Objection to Govt's Motion for Notice of Alibi and Deft's Motion for Protective Order endorsed: Objection overruled and Motion for Protective Order denied. No prejudice shown. Compliance by 1/3/77. Newman, J. m-12/28/76. copies mailed to counsel	3/	12/28/76	G	8
12/28	Marshal's return showing service, filed: Warrant for Arrest of Deft.				
1977					
1/3	On JON's Jury Assignment List: Ready, Jury Selected. Newman, J. m-1/4/77				
1/3	JURY TRIAL COMMENCES: 11:00 In the absence of the jury Court hears deft's Motion to Sever Counts- motion denied for reasons stated in open Court. 11:13 A.M. Oath on Voir Dire administered. 48 jurors respond to roll. Court describes case to the jury. one juror excused for cause. A basic panel of 35 names drawn. Govt. allowed 8 challenges and deft.				
3					

over

C

UNITED STATES DISTRICT COURT
CRIMINAL DOCKET

DATE 1977	PROCEEDINGS (continued)	V. EXCLUDABLE DEL		
	(Document No.)	(a)	(b)	(c)
1/3	allowed 12 challenges. Twelve jurors and three alternates impanelled and sworn. Clerk's office to notify jurors when testimony is to begin. 11:50 A.M. Court adjourned in this matter. Newman, J. m-1/4/77.			
1/4	Motion to Suppress Photographic and In-Court Identifications, Motion to Suppress Tangible Property, Motion for Production of Exculpatory Evidence and for List of Witnesses, filed by deft.			
1/5	Supplemental Motion for Production of Exculpatory Evidence, and Motion for Severance, filed by deft.			
1/6	Marshal's return showing service, filed: (3) Subpoenas to Produce and (6) Subpoenas to Testify.			
1/7	Court Reporter's Sound Recording of Proceedings (Plea) held on 11/23/76, filed. Gale, R.			
1/7	Trial Memorandum, filed by govt.			
1/10	Hearings held on Motions to Suppress Photographi ID and to Suppress Tangible Objects. Deft. moves to be absent from the Courtroom During the ID hearing-granted. Five Govt. witnesses sworn and testified. Hearing Ex. 1, filed. Hearing Exs. 2 & 3 marked for ID. One govt. witness sworn and testified. 3:16 P.M. Govt. rests on Photo ID issue. Deft. is returned to Courtroom and hearing begins on motion to Suppress Tangible Objects. Two govt. witnesses sworn and testified. Govt. rests at 4:15 P.M. One deft. witness sworn and testified. Counsel stipulate that Mary Thomas was shown a photo spread and that she did not identify the deft. Decision reserved. 5:16 P.M. Court adjourned. Newman, J. m-1/11/77.			
1/10	Marshal's return showing service, filed: (3) Subpoenas to Produce and (8) Subpoenas to Testify.			
1/11	JURY TRIAL CONTINUES: Counsel advise Court the deft. is to change his plea to Cts. 4 and 6. CHANGE OF PLEA: Deft. request leave to change his plea of not guilty entered earlier to Cts. 4 & 6. Court grants request and order previous plea erased from the record. Deft. is put to plea again and pleads guilty to Cts. 4 & 6. Cts. 1, 2, 3 & 5 to be dismissed at sentencing. Case continued on same bond for sentencing on 2/14/77.* Newman, J. m-1/11/77. *10:10 A.M. 15 jurors, who reported for duty at 10:00 A.M., are excused by the Court.			

DATE	PROCEEDINGS (continued)	V. EXCLUDABLE DELA			
		(a)	(b)	(c)	(d)
1977	(Document No.)				
1/13	Marshal's return showing service, filed: (2) Subpoenas to Testify.				
1/17	Marshal's return showing service, filed: (1) Subpoena to Testify and (3) Subpoenas to Produce.				
1/24	Court Reporter's Notes of Proceedings (COP) held on 1/11/77, filed. Gale, R.				
2/14	DISPOSITION: Impr. 2 yrs on Ct. four. Impr. ten yrs on Ct. six, suspended forthwith and the defendant is placed on probation for a period of five years. To commence after all confinement in this matter. As to the criminal contempt impr. six mos. to run consecutive to sentence imposed on Ct. four.. Court recommends commitment to F.C.I. Lexington, Ky. Execution of sentence is stayed until 2/21/77. Newman, J. m-2/14/77.				
2/14	Order for Dismissal of Cts. One, Two, Three and Five, filed by govt. and leave of Court is granted. Newman, J. m-2/14/77				
2/16	Judgment and Commitment, filed and entered. Newman, J. m-2/16/77 Two cert. copies handed to U.S. Marshal for service.				
2/17	Notice of Appeal from Conviction on criminal contempt, filed by deft.				
2/17	Court Reporter's Sound Recording of Proceedings (DISP) held on 2/14/77, filed. Gale, R.				
2/18	Notice of Appeal, filed by Deft.				
2/24	Certified copies of Notice of Appeal (2), docket entries and Criminal Information Form mailed to Clerk, U.S.C.A.				
3/1	CJA Form 21 authorizing transcript of proceedings held on Nov. 23, 29, 30, Dec. 3, 1976 and Feb. 14, 1977, filed. Newman, J. copies distributed.				

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA

v.

DAVID DANIEL EVANS

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CRIMINAL NO. N-76-145

NOTICE OF READINESS

Please take notice that the Government is ready
for trial in the above-captioned case.

Dated at New Haven, Connecticut, this 23rd day
of November, 1976.

UNITED STATES OF AMERICA

PETER C. DORSEY
United States Attorney

By

HUGH W. CUTHBERTSON
Assistant United States Attorney

CERTIFICATION

This is to certify that a copy of the foregoing
Notice was mailed postage pre-paid to Andrew B. Bowman, Esquire,
Federal Public Defender, 770 Chapel Street, New Haven,
Connecticut this 23rd day of November, 1976.

HUGH W. CUTHBERTSON
Assistant United States Attorney

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA

v.

DAVID DANIEL EVANS

CRIMINAL NO. N-76-145

MOTION TO COMPEL MAJOR CASE
FINGERPRINTS AND HANDWRITING EXEMPLARS

The United States of America respectfully moves this court for an order compelling DAVID DANIEL EVANS, the defendant herein, to provide special agents of the Federal Bureau of Investigation with a complete set of major case fingerprints and exemplars of his handwriting for the purposes of comparison with evidence obtained in the investigation of this case.

Specifically, the Government requires a complete set of major case fingerprints from the defendant in order to analyze and compare certain partial or fragmentary fingerprints which were found on pieces of evidence in this case. The Government requires sufficient exemplars of the defendant's handwriting in order to determine whether he wrote the following:

This is a stick up give me all yours
money.

This is a stick up give me the money.

In support of this motion, the Government relies upon United States v. Wade, 388 U.S. 218, 221-223 (1967); Gilbert v.

California, 388 U.S. 263 (1967); United States v. Dionisio,
410 U.S. 1 (1973); United States v. Mara, 410 U.S. 19 (1973);
8 Wigmore on Evidence, § 2265 (McNaughton rev. 1961).

UNITED STATES OF AMERICA

PETER C. DORSEY
United States Attorney

By

HUGH W. CUTHBERTSON
Assistant United States Attorney

CERTIFICATION

This is to certify that a copy of the foregoing Motion
was hand delivered to Andrew B. Bowman, Esquire, Chief Federal
Public Defender, 770 Chapel Street, New Haven, Connecticut
this 29th day of November, 1976.

HUGH W. CUTHBERTSON
Assistant United States Attorney

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA

-vs-

DAVID DANIEL EVANS

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CRIMINAL NO. N-76-145

DEFENDANT'S MEMORANDUM IN OPPOSITION TO GOVERNMENT'S
REQUEST FOR PALM PRINT AND HANDWRITING

On November 23, 1976, the Government stated in writing that it was ready for trial in this case. On November 24, 1976, the defendant, who had been in state custody since November 9, 1976 in connection with the present bank robbery charges was presented for arraignment on an indictment charging him with the commission of three different bank robberies, which according to representations made by the prosecutor were accomplished by means of demand notes. At arraignment the federal public defender was appointed, and later that morning the prosecutor moved for an order requiring the defendant to submit to "major case printing" by the FBI and to give examples of his handwriting. [When the U.S. Marshal, prior to arraignment, originally took custody of the defendant, he obtained fingerprints on a standard fingerprint card, and the defendant signed his name on the card.] Although the defendant objected to the Government's request, it was finally agreed among the prosecutor, the Court and defense counsel (after consultation with the defendant) that the palm prints and handwriting would be taken by the FBI on the condition that the prints and handwriting would remain in the custody of the clerk of the court until such time as the Court ruled on defendant's

objection. Subsequently defense counsel advised the FBI and the Court that the defendant would not submit to additional printing or the taking of handwriting exemplars.

The defendant's objection to the Government's motion rests on Fifth Amendment due process grounds, Fourth Amendment reasonableness grounds and the absence of any specific statute or rule authorizing the type of post indictment discovery as that requested by the Government in this case. It is the defendant's position that the Government's request and the defendant's objection present serious jurisprudential policy considerations which have not been fully considered in previous cases. While the Government takes the position that since defendant has no Fifth Amendment self incrimination clause privilege because of Gilbert v. California, 388 U.S. 263 (1967), he must be compelled to comply with its request; the defendant contends that since we have passed the inquisitorial phase of the proceeding and by virtue of the return of a true bill have entered the accusatorial stage of the proceeding, the proper question is whether there is authority enabling the Government to extract additional evidence from the person of an accused without his consent.

In United States v. Doe (Schwartz), 457 F.2d 895, 899 (2d Cir. 1972), the Second Circuit upheld the use of a grand jury subpoena to compel handwriting, while recognizing that " . . . an important aspect of the grand jury's function [is] that of . . . a protective buffer between the accused and the prosecutor." Indeed the distinction between a post-indictment request by the Government and a grand jury subpoena rests not only on the rationale that the grand jury served a protective function but also that it was entitled to every man's evidence. The Government

however has been granted no such sweeping powers. Moreover the Supreme Court has ruled that defendant's objection would have no merit were he to be confronted with a grand jury subpoena, United States v. Dionisio, 410 U.S. 1 (1973), United States v. Mara, 410 U.S. 19 (1973). However, the present case has entered the accusatorial stage. It is not the grand jury with its dual function that seeks evidence from the person of the defendant; it is the Government.

Although the Government asserts in a pleading filed with this court that it is now ready for trial, it seeks without support of statute or rule to extract yet more evidence to be used against the defendant without any factual basis except the return of the indictment. It is safe to assume that either the grand jury rejected the course of action now pursued by the Government or it found the present request unnecessary. In either event no grand jury subpoena was issued for the handwriting or the fingerprints of the defendant.

The Government's request constitutes pretrial discovery. Pretrial discovery is regulated by Rule 16 of the Federal Rules of Criminal Procedure. Nowhere in Rule 16 is the Government's request authorized. While in 1975 the Supreme Court and Congress enlarged the Government's right to discovery of certain defenses such as alibi (Rule 12.1) and insanity (Rule 12.2), no rule authorizing the discovery requested by the Government in this case was enacted. See Schwartz supra at 900-901 (Proposed Amendments to the Federal Rules of Criminal Procedure 52 FRD 409, 462 (1971) proposed new Rule 41.1).

In the context of a post-indictment request by the Government, the Court must consider the balance of forces between the accused and the Government. Indeed the Due Process Clause requires this

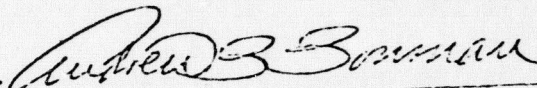
type of analysis, Wardius v. Oregon, 412 U.S. 474 (1973). It is the Government that bears the burden of proving the defendant's guilt, and the defendant should not be compelled to do the Government's job, especially in view of the resources available to the prosecution. While in the case of a grand jury subpoena no showing of reasonableness is required by virtue of the grand jury's dual function, no such admirable motive can fairly be attributed to the Government since it has proclaimed its readiness to try the defendant even before the present request was made of the defendant. Absent a specific factual basis the Fourth Amendment prohibits the Government's seizure of additional fingerprints and handwriting as unreasonable.

Finally if there is any life to be found in the Ninth and Tenth Amendments or in the notion that ours is a Government of limited powers, the Government's view, that absent a specific privilege it is entitled to the defendant's handwriting and palm-prints, is without statutory or constitutional basis. The proper question remains that of statutory authority, and since there is none, the Government's request must be denied. The Government's argument would not only change the nature of our criminal justice system from accusatorial to inquisitorial, and thereby grant the Government power to extract physical characteristics from an accused in the absence of statutory authority, but would also allow the Government to compel an accused to prove the Government's case, all in the absence of a showing of reasonableness, necessity or unavailability which is required by the Fourth Amendment and the Due Process Clause of the Fifth Amendment.

For the foregoing reasons, defendant respectfully requests
that his objection be sustained.

THE DEFENDANT

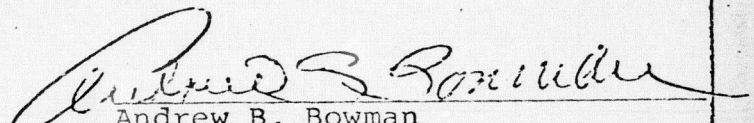
DAVID DANIEL EVANS

By: 

Andrew B. Bowman
Federal Public Defender
770 Chapel Street
New Haven, Connecticut

CERTIFICATION

I hereby certify that a copy of the above motion has been
sent, postage pre-paid, to High Cuthbertson, Esq., Asst.
United States Attorney, Post Office Box 1824, New Haven, CT.


Andrew B. Bowman

RECEIVED

NOV 30 1976

OFFICE OF THE FEDERAL
PUBLIC DEFENDER, N.H.

1976 United States District Court
District of Connecticut
FILED AT NEW HAVEN

11/29 1976
Sylvester A. Markowski, Clerk
By: *[Signature]*
Deputy Clerk

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA

v.

DAVID DANIEL EVANS

CRIMINAL NO. N-76-145

ORDER

The defendant, DAVID DANIEL EVANS, is hereby ORDERED
to provide special agents of the Federal Bureau of Investigation
with a complete set of major case fingerprints and exemplars
of his ^{PRINTED} handwriting as follows:

This is a stick up give me all yours
money.

This is a stick up give me the money.

[Signature]
JON O. NEWMAN
United States District Judge

Dated: Nov 29 1976

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA

v.

DAVID DANIEL EVANS

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CRIMINAL NO. N-76-145

MOTION FOR ORDER TO SHOW CAUSE
WHY THE DEFENDANT SHOULD NOT BE
HELD IN CRIMINAL CONTEMPT

The United States of America hereby moves the court
for an order to show cause as follows:

On November 29, 1976, this court ordered the defendant
to provide special agents of the Federal Bureau of Investigation
with a complete set of major case fingerprints and exemplars
of his printed handwriting.

On November 30, 1976, the defendant refused to comply
with this court's order in that he refused to provide a special
agent of the Federal Bureau of Investigation with a complete
set of major case fingerprints.

WHEREFORE, the United States of America charges that
the defendant is in criminal contempt of this court and prays
that an order be issued by this court, based upon this petition
and the accompanying affidavit, pursuant to Rule 42, Federal
Rules of Criminal Procedure, directing the defendant to appear
before this court at the time fixed in said order, to show
cause why he should not be punished for criminal contempt
of court, and further prays that upon the hearing of the
charges contained herein, the defendant be found guilty of

criminal contempt and that such imprisonment for a term not exceeding six months or fine, or both, be imposed upon the defendant as may be deemed proper.

Dated at New Haven, Connecticut this 30th day of November, 1976.

UNITED STATES OF AMERICA

PETER C. DORSEY
United States Attorney

By *Hugh W. Cuthbertson*

HUGH W. CUTHBERTSON
Assistant United States Attorney

CERTIFICATION

This is to certify that a copy of the foregoing Motion was hand delivered to Andrew B. Bowman, Esquire, Federal Public Defender, 770 Chapel Street, New Haven, Connecticut this 30th day of November, 1976.

Hugh W. Cuthbertson

HUGH W. CUTHBERTSON
Assistant United States Attorney

DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA

v.

DAVID DANIEL EVANS

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CRIMINAL NO. N-76-145

AFFIDAVIT IN SUPPORT OF
MOTION FOR ORDER TO SHOW CAUSE

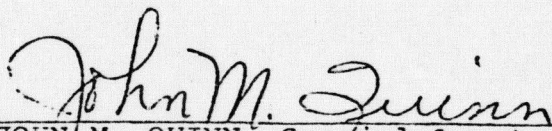
I, John M. Quinn, being first duly sworn, say:

1. I am a special agent with the Federal Bureau of Investigation and have been so employed for seven years.

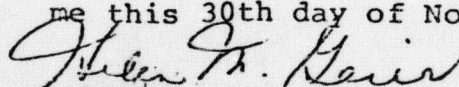
2. On November 30, 1976, during the course of my official duties and pursuant to this court's order, dated November 29, 1976, I requested David Daniel Evans, the defendant herein, to provide me with a complete set of major case fingerprints.

3. On November 30, 1976, after having asked David Daniel Evans to provide me with a complete set of major case fingerprints, David Daniel Evans refused to do so.

4. This affidavit is made in support of a motion for an order to show cause why the defendant should not be held in criminal contempt for refusing to obey this court's order, dated November 29, 1976, directing the defendant to provide special agents of the Federal Bureau of Investigation with a complete set of major case fingerprints and exemplars of his printed handwriting.


JOHN M. QUINN, Special Agent
Federal Bureau of Investigation

Subscribed and sworn to before
me this 30th day of November, 1976.


NOTARY PUBLIC

My Commission Expires

3/31/80

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DEC 1 1976

OFFICE OF THE FEDERAL COURT
PUBLIC DEFENDER, N.H.

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA

v.

DAVID DANIEL EVANS

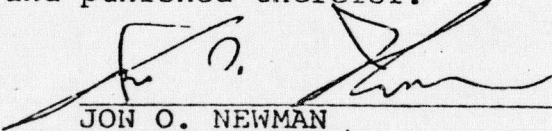
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CRIMINAL NO. N-76-145

ORDER GRANTING MOTION TO SHOW CAUSE
WHY THE DEFENDANT SHOULD NOT BE
HELD IN CRIMINAL CONTEMPT

On motion for order to show cause filed by the
United States Attorney, and good cause appearing therefor;

IT IS HEREBY ORDERED that you, DAVID DANIEL EVANS,
appear before the Honorable Jon O. Newman, United States
District Judge for the District of Connecticut, United States
District Court, Post Office Building, New Haven, Connecticut
06510, on the 2 day of Dec. , 1976, at 9:30 A.M.
and show cause why you should not be adjudged guilty of
criminal contempt of court and punished therefor.


JON O. NEWMAN
United States District Judge

Dated: Nov 30, 1976

United States District Court

FOR THE

DISTRICT OF CONNECTICUT

FILED

FEB 16 2 21 PM '77

No. N-76-145 Criminal DISTRICT COURT
NEW HAVEN, CONN.

United States of America

v.

DAVID DANIEL EVANS

MICROFILM

FEB 16 1977

NEW HAVEN

On this 14th day of February, 1977 came the attorney for the government and the defendant appeared in person and by counsel

IT IS ADJUDGED that the defendant upon his plea of guilty and the Court being satisfied there is a factual basis for the plea has been convicted of the offense of violation of Title 18, Section 2113(b), of the United States Code (did take and carry away with intent to steal and purloin, money in excess of \$100.00 belonging to and in the care of a bank, the deposits of which were then insured by F.D.I.C.)

as charged in Counts Four and Six, the remaining Counts dismissed

-as-charged-

and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

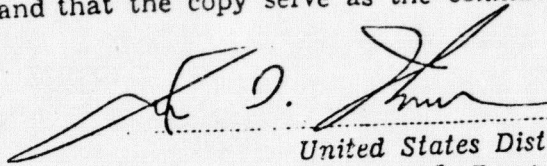
IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of two (2) years on Count Four.

IT IS ADJUDGED that the defendant is committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of ten (10) years on Count Six; execution of sentence of imprisonment is suspended forthwith and the defendant is placed on probation for a period of five (5) years, which is to commence upon his release from custody, and in addition

IT IS ADJUDGED that the Court having found the defendant in criminal contempt of the Court's Order dated November 29, 1976, the defendant is committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of six (6) months. Said sentence is to run consecutively to the sentence imposed on Count Four.

IT IS FURTHER ADJUDGED that the execution of sentence is stayed until February 21, 1977.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.



United States District Judge.

The Court recommends commitment to⁶ the Federal Correctional Institution at Lexington, Kentucky.

Clerk.

¹ Insert "by [name of counsel], counsel" or without counsel; the court advised the defendant of his rights to counsel and asked him whether he desired to have counsel appointed by the court, and the defendant thereupon stated that he waived the right to the assistance of counsel." ² Insert (1) "guilty and the court being satisfied there is a factual basis for the plea," (2) "not guilty, and a verdict of guilty," (3) "not guilty, and a finding of guilty," or (4) "nolo contendere," as the case may be. ³ Insert "in count(s) number _____" if required. ⁴ Enter (1) sentence or sentences, specifying counts if any; (2) whether sentences are to run concurrently or consecutively and, if consecutively, when each term is to begin with reference to termination of preceding term or to any other outstanding unserved sentence; (3) whether defendant is to be further imprisoned until payment of the fine or fine and costs, or until he is otherwise discharged as provided by law. ⁵ Enter any order with respect to suspension and probation. ⁶ For use of Court to recommend a particular institution.

FILED

FEB 17 10 30 AM '77

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

U. S. DISTRICT COURT
NEW HAVEN, CONN.

UNITED STATES OF AMERICA

-vs-

DAVID DANIEL EVANS

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:
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:

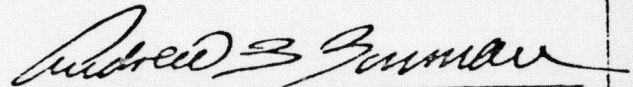
Criminal No. N-76-145

NOTICE OF APPEAL

Notice is hereby given that David Daniel Evans, defendant, hereby appeals to the United States Court of Appeals for the Second Circuit from the judgment of conviction of Criminal Contempt entered on the 14th day of February, 1977.

Dated:

February 15, 1977


Andrew B. Bowman
Federal Public Defender
770 Chapel Street
New Haven, Connecticut 06510
Attorney for Defendant

1 MR. CUTHBERTSON: In Criminal N-76-145 United
2 States versus David Daniel Evans, the Government moves that the
3 defendant be required to give major case fingerprints to agents
4 of the Federal Bureau of Investigation and handwriting exemplars
5 at this time. I would point out this is not routine processing
6 which the Marshal does. The prints, which the agents would
7 like, are different prints, not merely fingerprint tip prints
8 but sides of the palm and the entire fingers as I understand,
9 prints which are not otherwise available and which the Marshal
10 does not take.

11 I would cite as authority United States versus
12 Lanoue, which is a criminal case pending in this district,
13 criminal N75-52, in which Judge Zampano granted the
14 Government's post indictment motion for handwriting exemplars
15 in that motion the government cited Gilbert versus California
16 388 U.S. 263; Schmerber versus California 384 U.S. 757; and
17 U.S. versus Wade 388 U.S. 218; U.S. versus Dionisio 410 U.S. 1;
18 and U.S. versus Mara 410 U.S. 19. That was a motion involving
19 handwriting exemplars.

20 In addition the Government would cite U.S. versus
21 Kelly 55 Fed. 2nd, 67, Second Circuit, 1932, involving
22 prohibition agent's authority to take fingerprints; and U.S.
23 versus Krapf 285 Fed. 2nd 647, Third Circuit, 1967, involving
24 the marshal's authority; and U.S. versus Laub Baking Company
25 283 Fed. Sup. 217, Northern District of Ohio, 1968.

1 We believe this supports the Government's
2 motion to have major case prints and handwriting exemplars
3 which are not protected by the Fifth Amendment at this time.

4 MR. BOWMAN: If it please the Court, this is
5 the first time I have heard of the Government's request for
6 handwriting. Mr. Cuthbertson did advise me they wanted the
7 side palm prints. What happened this morning was when the U.S.
8 Marshal picked up Mr. Evans from the custody of the State
9 authorities at Whalley Avenue Jail they printed and they took
10 fingerprints that they take of every person who appears for
11 arraignment in this court.

12 Subsequent to arraignment I was notified by Mr.
13 Cuthbertson that the FBI wanted to take the sides of his palm
14 prints.

15 Now, they returned an indictment which is a six
16 count indictment charging three different bank robberies and
17 there appears to be no showing by the Government of the need
18 for taking successive set of palm prints or hand prints or
19 fingerprints.

20 They have made no showing that they have certain
21 prints which have been found inside the bank in any particular
22 position which would dictate the need for coming to court and
23 asking the Court to order the defendant to submit to the
24 additional set of fingerprint procedures.

25 I feel in the absence of such a showing for the

4
1 Government to walk in here and state that because something is
2 not protected by the Fifth Amendment, that, therefore, they have
3 a right to take any physical characteristics from a defendant
4 in the absence of some showing of why they need it and why
5 they couldn't have gotten it during the investigative processes
6 of this case, then I would ask the Court to deny their motion,
7 especially equally with respect to the printing and with the
8 handwriting and especially since this is the first time I ever
9 heard they asked for handwriting.

10 THE COURT: I don't think there needs to be a
11 further showing in this situation since an indictment has been
12 returned. There may be a situation where the Government in
13 order to just bring somebody in off the street and obtain
14 information from them which is not protected by the Fifth
15 Amendment must make some showing in order to interrupt the
16 privacy of a citizen, but once a matter has been presented to
17 a grand jury and an indictment has been returned it seems to me
18 there has been enough basis to single that person out from the
19 citizenry generally, so that to avoid any concern that the
20 Government is pursuing any dragnet operation of indiscriminately
21 wanting fingerprints or handwriting, and I don't think any
22 further showing is needed as to the specific need for finger-
23 prints or handwriting in this case.

24 I think at that point issues of privilege are all
25 that's available and the Fifth Amendment privilege does not apply.

1 MR. BOWMAN: I am aware of that. The concern I
2 have with the Government not making some factual showing or
3 alleging some basis upon which they need additional physical
4 characteristic is that the Court is really unaware of whether
5 or not they want handwriting which pertains to these charges.
6 I mean, I really don't even know what the Government --

7 THE COURT: That's the next thing I was getting
8 to. Have you shown what it is you want written out so that
9 there is no dispute that something is being written which
10 might be available for its content rather than its style?

11 MR. CUTHBERTSON: Your Honor, the indictment
12 concerns three bank robberies and each bank robbery a demand
13 note was given to a teller. The precise wording on the demand
14 note that the Government would like reproduced by the defendant
15 to compare the writing --

16 MR. BOWMAN: May I ask the Court for a day to
17 at least do some research in the area and then before the Court
18 rules at least submit a memorandum to the Court of whatever
19 additional legal arguments I can make? I haven't had notice
20 about the handwriting.

21 I have had, you know, twenty minutes notice on
22 the fingerprinting, and I would like to satisfy myself that my
23 client does not have any type of claim to be made before he
24 possibly risks contempt by refusal to give what may be ordered
25 by the Court. I don't think I am prejudicing anybody by this

1 and this case has just begun and I would just ask for that time,
2 if the Court could grant me until Friday to submit something to
3 the Court before the Court rules.

4 MR. CUTHBERTSON: To set the record straight on
5 notice, when I called Mr. Bowman approximately half an hour ago
6 I did originally say we wanted fingerprints. I did inform him
7 when he arrived in court that handwriting would also be asked
8 for. I realize that's not a great deal of notice but prior to
9 coming into the courtroom he was notified of that fact.

10 MR. BOWMAN: I don't have a library right here
11 in the courthouse, as the Court well knows.

12 THE COURT: I will be glad to review your legal
13 papers. I just wonder if it's necessary to bring the defendant
14 back again or whether or not he can't be printed and supply
15 the ememplar and leave those in the custody of the Marshal
16 until there is a ruling or leave them in the custody of the
17 Clerk.

18 MR. BOWMAN: May I consult with my client?

19 THE COURT: Yes.

20 MR. BOWMAN: That's acceptable to the defendant.

21 THE COURT: Let me explain this to Mr. Evans.
22 Mr. Evans, I'm going to direct you at this point to permit the
23 Marshal to obtain a full set of fingerprints which will involve
24 not only the finger tips but various portions of your hand, the
25 side of your hand, possibly the wrist and also a handwriting

1 exemplar, which means you will be asked to write out probably
2 more than one copy of certain words that the Assistant United
3 States Attorney will show you and your lawyer.

4 I should caution you that if it ever appears
5 later on that your handwriting in furnishing what's called an
6 exemplar, if it ever appears that you have endeavored to
7 disguise your handwriting or alter it in any way you would be
8 in contempt of this Court and face separate penalties wholly
9 apart from the charges you now face; do you understand that?

10 MR. EVANS: Yes, I understand.

11 THE COURT: Then I will direct that the original
12 fingerprint cards and the handwriting exemplars be turned over
13 to the Clerk of the Court and held pending further order of
14 the Court.

15 MR. BOWMAN: I want to be clear for the record
16 that I do object to the Government's motion.

17 THE COURT: All right.

18 MR. CUTHBERTSON: To make everything clear, the
19 agents of the FBI will be the ones actually taking the prints,
20 not the Marshal. It will be at the Marshal's office.

21 THE COURT: All right. The agents are authorized
22 to take the prints in the Marshal's office and to promptly
23 surrender the cards to the Clerk.

24 (A recess was taken.)

25 MR. CUTHBERTSON: Good afternoon, Your Honor,

1 criminal number N76-145, U.S. versus David Daniel Evans. I
2 am advised that after Your Honor ordered the defendant to
3 supply special agents of the FBI with a complete set of finger-
4 prints, full case prints, and specified handwriting exemplars,
5 that he refused to comply with the Court's order and we are
6 here this afternoon to ask for an order to show cause why he
7 should not be found held in criminal contempt.

8 MR. BOWMAN: What was the last part?

9 MR. CUTHBERTSON: We are here this afternoon to
10 ask for an order to show cause why he should not be held in
11 criminal contempt.

12 MR. BOWMAN: Prior to Your Honor ruling on the
13 question of whether or not the Court is going to find the
14 defendant in contempt, I do have additional arguments that I
15 would like to present to the Court at this time. I would also
16 like to call the United States Marshal who fingerprinted him
17 this morning to establish the fact that he was fingerprinted
18 and exactly how extensively the fingerprinting was and the fact
19 that the defendant did supply his own handwriting by signing
20 the fingerprint card, so I would ask for permission to do that
21 first.

22 THE COURT: Well, if it's not in dispute I don't
23 know that we need testimony on the point. If that's the claim
24 that he supplied fingerprints to the extent normally taken by
25 the marshal, which is simply impression of his fingers, less

1 than what was requested and ordered --

2 MR. BOWMAN: It's just fingerprints and he also
3 signed the fingerprint card this morning. He was printed by
4 Marshal Cunningham and he signed the fingerprint card.

5 As long as that's not in dispute then I don't
6 need the taking of testimony to establish that part of it.

7 MR. CUTHBERTSON: The Government agrees to that.
8 We are not disputing that fact.

9 MR. BOWMAN: My claim is not a Fifth Amendment
10 claim. My claim is both Fourth and a Fifth Amendment due
11 process claim.

12 The Fourth Amendment reasonableness claim and
13 I would like to be able to further expand upon that at this
14 time.

15 First of all, I think successive fingerprinting
16 is unreasonable unless there is some showing, and I am not
17 exactly sure what that showing should be or could be, of a
18 necessity for additional fingerprinting.

19 I think that when the Government in a post-
20 indictment situation seeks to utilize the Court's powers for the
21 obtaining of additional evidence, then one can only wonder
22 whether or not an indictment was returned prematurely and
23 whether or not there has been a misuse of the grand jury.

24 I think, further, that in support of the reason-
25 ableness argument that it's a degrading and humiliating

1 procedure for a person to have to sit down and be ordered by an
2 agent of the FBI or by anyone else to give certain samples of
3 his handwriting.

4 It's unnecessary in this case because in terms
5 of fingerprinting it's already been done and it's unnecessary
6 in terms of handwriting because an indictment and probable
7 cause has already been found in his case; secondly, Rule 16B
8 of the Federal Criminal Rules outlines what the Government can
9 obtain from a defendant in terms of pretrial discovery. These
10 rules were promulgated by the Supreme Court. They were passed
11 upon by Congress.

12 It's interesting to note that in 1966, which was
13 after the Gilbert Decision and the Wade Decision, Congress did
14 for the first time permit Government discovery of certain items
15 from a defendant and most recently in 1975, new reciprocal
16 discovery rules have been promulgated and enacted and in neither
17 instance in 1966 nor 1975 did Congress authorize the Government
18 to be able to obtain handwriting, which is additional evidence,
19 from a defendant who has already been indicted prior to trial.

20 I think when one begins to examine probably the
21 most recent Supreme Court case on the subject, and that is the
22 Dionisio case, 410 U.S. 1, 1973 case, that was a grand jury case
23 where there was a grand jury subpoena and there was a court order
24 to compel voice exemplars.

25 One can fairly argue that during the course of

1 the grand jury investigation the grand jury has the right to
2 get, to obtain evidence or to take evidence from any man as
3 long as it is pursuing an investigation into the possible
4 criminal violation of the Federal Code, but once a person is
5 indicted then the Government may seek evidence. The Government,
6 not the grand jury. But it may seek evidence.

7 The defendant has already been charged and he is
8 entitled to certain protections. The Congress and the Supreme
9 Court has outlined what areas the Government may intrude into
10 by virtue of Rule 16, so we have a situation where in one
11 instance in the Dionisio case you have the grand jury that has
12 the right to any man's testimony as a witness before it, and in
13 this case you have a post-indictment situation which the
14 Government is essentially attempting to use the Court to es-
15 tablish evidence which it should have obtained during a grand
16 jury investigation, or I should more properly say that the grand
17 jury should have obtained.

18 I think in a recent Second Circuit case, U.S.
19 versus Doe (Schwartz) 450 Fed. 2nd., 898 and 899, Judge
20 Friendly spoke about the need to protect an innocent person who
21 is subpoenaed by the grand jury to give handwriting exemplars --
22 really, the whole public policy in affording the grand jury to
23 obtain this type of evidence, because the grand jury has a
24 legitimate function in protecting the innocent, and that if they
25 find that a person who may be the target of an investigation, if

1 his handwriting does not match that of the handwriting which
2 could be hypothetically the handwriting on a note in a bank
3 robbery, that they also have the option of returning a no true
4 bill, but here's no protective function at all.

5 It's merely additional discovery. It's outside
6 of Rule 16 and for the reasons stated at the beginning of this
7 argument. It's unreasonable, and in the absence of any showing
8 by the Government, and I am not at all suggesting what the
9 showing has to be, but the mere fact of an indictment, I would
10 submit to the Court, is not sufficient to compel a person to
11 give a physical characteristic such as handwriting or successive
12 fingerprinting.

13 THE COURT: Could the Government make him stand
14 up at his trial?

15 MR. BOWMAN: I believe the case law is that they
16 could but that's at trial.

17 THE COURT: Is there a distinction between him
18 standing at trial and his providing a fingerprint at trial?

19 MR. BOWMAN: The difference I think is whether or
20 not the Government is going to use a post-indictment process to
21 gather evidence.

22 THE COURT: Such as his standing at trial to
23 display his facial characteristics to the trier?

24 MR. BOWMAN: Well, I think that his facial
25 characteristics would be as apparent if he were sitting as if he
were standing.

1 THE COURT: Supposing if a situation of stature
2 or wearing particular clothing?

3 MR. BOWMAN: If it's in that instance it's part
4 and parcel of the person as he appears in court that day but
5 that's far from --

6 THE COURT: Why isn't the characteristic of his
7 fingerprints and the characteristic of his handwriting as much
8 a part of him as his stature?

9 MR. BOWMAN: They are both physical characteris-
10 tics but in the case of a person sitting in a courtroom they
11 have already photographed him, they already have his photograph
12 so they can use that for whatever investigative purposes they
13 want.

14 THE COURT: Isn't there just no question that
15 the Government can do more than that at trial, can make him
16 stand, walk in front of the jury, put on clothing?

17 MR. BOWMAN: Well, there may be some circum-
18 stance with respect to the putting on of clothing, they may not
19 be able to do depending on what the facts of the situation were,
20 but here we are just having a continuing investigation by the
21 Government with nothing more than the showing of probable cause
22 by an indictment to justify it.

23 I don't think it's a fair assumption to make
24 that if something is not protected by the self-incrimination
25 clause of the Fifth Amendment that therefore the Government is

1 entitled to it afortiori. I don't think that's a fair
2 assumption to make. I think there must be some basis on which
3 to base a seizure of something to make it reasonable and here
4 there isn't anything.

5 Here presumably they have got enough evidence to
6 indict and in sixty days from now they are supposed to have
7 enough evidence to be able to present to carry their burden in
8 a criminal case and be ready for trial, and if they aren't then
9 that's their problem. It just doesn't mean because something
10 isn't absolutely protected by the self-incrimination clause
11 that, therefore, the defendant doesn't have a due process right
12 not to be subjected to whatever fishing expedition the
13 Government wants to put him through to make him the victim of.
14 I mean there could be no limit to what they could do.

15 They could start plucking his hair, drawing his
16 blood, taking his handwriting, fingerprinting, time after time.

17 THE COURT: They have made their claim as to
18 the purpose of the note, for his handwriting. There is a note
19 used in connection with the very offense for which he has been
20 indicted. It scarcely would take more of a showing than that
21 to show the reasonableness of wanting handwriting.

22 They have not yet made any claim as to the prints
23 although -- it shouldn't be too difficult for them to make
24 some representation in that regard whether or not they have to.

25 MR. BOWMAN: If Your Honor please, they were

1 fully able to suggest to the Foreman of the grand jury that he
2 seek handwriting from this defendant.

3 THE COURT: I don't think there is any require-
4 ment that the Government's proof at trial is limited to what
5 they were able to obtain at the time of the grand jury
6 indictment.

7 MR. BOWMAN: There is a limit to what they can
8 discover from the defendant himself. I mean, clearly the
9 Rules 16C provisions do not deal only in terms of what is not
10 protected by the Fifth Amendment.

11 I mean, if I am going to submit -- if the
12 Government were going to base its entire case on fingerprint
13 analysis, I could be compelled to give the Government my
14 expert's report on virtually anything that I intended to
15 introduce at trial. That's nothing to do with a Fifth Amendment
16 right but Congress has spoken on the subject.

17 THE COURT: It's hard to think that if Congress
18 expected a turnover of expert reports that they didn't expect
19 there would be the opportunity to take the fingerprints and
20 provide a basis to write a report.

21 MR. BOWMAN: They didn't give the Government
22 that right. They didn't give the Government the right to go
23 after a person time and time after time and Gilbert was decided
24 in 1965.

25 THE COURT: There is no claim of harassment.

1 There is no claim he has been brought back several times and
2 subjected to indignities?

3 MR. BOWMAN: No, but Gilbert, which was a post-
4 indictment case, preceded the Federal -- the enactment of the
5 Federal rule under Rule 16 which permitted the Government to
6 have access to the defendant's file.

7 THE COURT: But there was a Federal Rule at the
8 time of Gilbert and it didn't spell out handwriting or finger-
9 prints?

10 MR. BOWMAN: No, but --

11 THE COURT: Your argument is that the omission
12 of that precludes the Government?

13 MR. BOWMAN: That's correct, especially in view
14 of the fact that Congress has had two opportunities now. There
15 was a great deal of debate about how far Congress should go in
16 terms of allowing the Government discovery of the defendant's
17 case and they settled on Rule 16C and 16C doesn't permit the
18 Government to --

19 THE COURT: It's hard for me to see how any
20 argument based on Rule 16 is any better than it was at the time
21 of the Gilbert case when there was also a Rule 16 which didn't
22 provide for what the Government wants now.

23 MR. BOWMAN: But Congress has afforded the
24 Government more of an opportunity for discovery.

25 THE COURT: The fact that Congress gives them

1 more of an opportunity scarcely argues that at the same time
2 they cut down on the opportunity that then existed.

3 MR. BOWMAN: One can only draw the inference
4 that if they seek to limit discovery to a certain degree that
5 they have considered what the ends of all possible discovery
6 could be and certainly --

7 THE COURT: It seems to me the far more logical
8 inference is that they assumed that certain things were obtainable,
9 whether they provided for them or not, and then the Gilbert case
10 confirmed that understanding and so then when they adopted the
11 rules to give the Government more they didn't see any reason to
12 spell out what the Government was entitled to have without a
13 rule.

14 MR. BOWMAN: If I can go to one final point, and
15 that is that there has been no showing that they cannot obtain
16 this defendant's handwriting from any other place other than by
17 compelling him to give it.

18 THE COURT: As far as handwriting they don't need
19 to do that. They are entitled to have handwriting of the words
20 that are in the questioned document and they are certainly not
21 limited to whatever other writings may exist to see if it's
22 possible to make a comparison.

23 They are entitled to have an examiner make a
24 comparison of his handwriting using the very words of the
25 questioned document, and surely they don't have to show that

1 these aren't around.

2 MR. BOWMAN: I can only reiterate my basic point
3 and that's that I feel it's a very dangerous assumption in a
4 democratic society to assume that because something is not
5 specifically protected by the Fifth Amendment self-incrimination
6 clause that, therefore, the Government has an absolutely right
7 to obtain it.

8 THE COURT: I don't think that the argument goes
9 that far. They want two things: handwriting and fingerprints.
10 They have not purported to ask for everything that's not
11 protected by the Fifth Amendment.

12 MR. BOWMAN: But there is no reason to afford
13 them this and not to afford them any greater intrusion on the
14 showing they have made.

15 THE COURT: To the extent the arguments rests on
16 a reasonable standard for the due process I don't think it will
17 difficult to draw the line between these demands and some
18 others that may truly be outrageous.

19 MR. BOWMAN: Also the fact that it's not
20 specifically authorized by Rule 16. This is certainly pretrial
21 discovery. There is no other way you can characterize it. It's
22 certainly tremendous intrusion into what you might conceptually
23 call the file of the defendant. It's part of his person. It's
24 a characteristic of himself.

25 THE COURT: Well, I don't find that argument

1 persuasive. I don't think it's more of an intrusion to make
2 him display parts of anatomy at the trial. That's more
3 personally intrusive. If there was some claim that the suspect
4 had a scar on his back they could make him take his shirt off
5 and display his back to the jury. That might be personally
6 embarrassing far more so than just writing out his handwriting
7 and putting his ink prints on the card.

8 MR. BOWMAN: But it's also that a Court can
9 compel a defendant to be present in a courtroom at his trial
10 which is another factor that's not present in the case other
11 than the fact that it can order him to give handwriting. In
12 that situation you could have him shackled and brought into
13 the courtroom and there aren't many decisions that I know of
14 that would not uphold a trial judge's right to have a defendant
15 present during his trial or indeed not present where he has a
16 Sixth Amendment right to be present.

17 In this case what the Court is ordering is that
18 the defendant give a part of his body, a part of his body that
19 I suppose in the case of fingerprints they could obtain by
20 force but in the case of handwriting they couldn't, and
21 basically it's our position that it is an intrusion that it is
22 not permitted by the law under 301.16 or under the reasonableness
23 standard of the Fourth Amendment or due process standard of the
24 Fifth Amendment.

25 THE COURT: Does the Government care to make any

1 further claim as to the necessity for the prints beyond the
2 Marshal's print?

3 MR. CUTHBERTSON: Yes, Your Honor. This morning
4 I explained why the Government wanted the handwriting. It was
5 with respect to the fact that there were three notes involved.
6 With respect to the fingerprints it is my understanding that
7 there were partial prints which were found on two of the notes.

8 There was a print which was lifted on the third
9 note. However, because a complete case print on the defendant
10 was not available, it was unable to be matched to those partial
11 prints found and for that reason a complete set of prints is
12 required to conduct any further analysis of the two demand
13 notes and, as I said this morning, the handwriting would be for
14 comparison purposes to the three notes themselves.

15 MR. BOWMAN: Is the Government saying that there
16 are partial prints on two of the notes, is that what you're
17 saying?

18 MR. CUTHBERTSON: It's my understanding there are
19 partial prints on some of the notes. I am not sure which of
20 the three notes but it's my understanding that the further
21 fingerprint analysis is required on those prints and I don't
22 believe that the partial prints, the prints are required to
23 make a comparison on the note which -- on which a print was
24 already found and favorably compared.

25 That's the Government's argument as to

1 reasonableness. I think Mr. Bowman presented the gist of his
2 arguments this morning before the Court ordered the defendant
3 to comply.

4 THE COURT: Well, one aspect of this that
5 concerns me is the procedure being followed. This morning I
6 had thought it was acceptable to direct the defendant to
7 produce the handwriting and the prints with the understanding
8 that his attorney would have -- I forget what I gave -- was it
9 until Friday to submit papers as to the Government's entitlement
10 to use those items, and that they would remain in the custody
11 of the Clerk until that time.

12 Now, the situation is somewhat different in
13 that the defendant is contesting his obligation to produce the
14 material sought at all. It's not clear to me really whether
15 the defendant needs the time to present any more than you have
16 presented already but I think we have to work out a procedure
17 here because the situation is different than what it was this
18 morning.

19 MR. BOWMAN: That's true, Your Honor. I think
20 with respect to the law I have outlined the arguments that I
21 would make were I given until Friday to make them and I believe
22 the record is as complete as it will be on Friday and that is
23 that the Marshal did fingerprint the defendant this morning
24 in the normal course of his duties and he did sign the finger-
25 print card.

1 THE COURT: Do you want until Friday to oppose
2 the Government's request?

3 MR. BOWMAN: Which request?

4 THE COURT: For the order directing him to
5 furnish handwriting and fingerprints. I realize I made that
6 order orally this morning but I did so at a time when I under-
7 stood that he would comply and that you would have the
8 opportunity to present by Friday your opposition to the use of
9 those materials.

10 Now that he is resisting that order it seems
11 to me I have to give you that same opportunity to present what-
12 ever you have an objection to the order itself.

13 MR. BOWMAN: I would certainly take advantage of
14 any further time the Court would grant me.

15 THE COURT: Well, all right. You can have until
16 Friday to present your opposition to the Government's request
17 and I will schedule a hearing on the Government's request for an
18 order. I think we are going to have in affect to back up and
19 start all over again.

20 So you will have until Friday to file your
21 opposition papers and then on Monday there will be a hearing
22 and in all likelihood a ruling one way or the other on the
23 Government's application for an order compelling the defendant
24 to produce handwriting and fingerprints.

25 I would suggest to the Government that they have

1 a proposed form of order available on Monday. If the order
2 issues and there is non-compliance then a determination will
3 have to be made as to what type of contempt procedure is to be
4 pursued, but that can certainly await Monday.

5 MR. BOWMAN: Thank you, Your Honor.

6 (Court was adjourned at 4:40 p.m.)

7 * * * *

MR. CUTHBERTSON: In Criminal N-76-145 the Government is filing a motion to compel major case fingerprints and handwriting exemplars and we also are filing a proposed order with the motion.

In addition to the cases which we have cited in the motion, which are only decisions decided by the Supreme Court, we would also rely upon the United States versus Rogers, which is found at 475, Federal 2nd, 821, the Seventh Circuit case, 1973 and United States versus Lincoln 494, Federal 2nd, 833, Ninth Circuit 1974; United States versus Ruggirello 454 Fed. 2nd, 725 Sixth Circuit 1972; United States versus Tucker 473, Fed. 2nd, 1290, Sixth Circuit 1973; United States versus Nix 465, Fed. 2nd, 90, which is a Fifth Circuit 1972 case. These cases, I believe, involved post indictment situations like the case before you this morning.

MR. BOWMAN: Your Honor, I believe the Government and the defendant are looking at this situation and asking two very different questions.

The Government's point of view is that since the Supreme Court has stated that self incrimination clause of the Fifth Amendment does not protect a defendant from giving fingerprints and handwriting, that, therefore, he must be compelled to give them.

The defendant is saying rather that in the absence of any authority irrespective of whether there is a

self incrimination clause privilege, that the Government must be required to show something in a post indictment situation, something more than a Grand Jury might be required to show before the defendant should be compelled or can be compelled to give physical characteristics, and the rationale is that the Grand Jury served a dual function. The Grand Jury served not only a function to seek out criminal violations but also as a protective buffer between the prosecutor and the citizen of this country.

I believe that it's basic to this democratic system that there be a showing of some kind made by the Government that it couldn't derive evidence from a source other than the defendant, and further that the defendant should not be required to assist the Government in proving its case against him.

We have entered the accusatorial stage of proceeding, we are no longer in the inquisitorial stage.

I believe that if one views the balance of forces that the Supreme Court talked about in Wardious, one can see that the Congress stopped short of giving the Government the power to compel a defendant to give physical characteristics.

I am not arguing that there is a self incrimination clause privilege here but rather that due process requires the Government go elsewhere at this stage of the proceeding to prove its case than from the person of the defendant.

Of course, I rely upon memorandum that I have

1 cited which sets more fully the basis of the defendant's argument.

2 THE COURT: Most of these issues were dis-
3 cussed when the matter was here last week and it comes up again
4 simply because at that time there was some prospect of handling
5 the matter in a different procedure of having the defendant
6 supply the materials and having their availability to the
7 Government delayed until Briefs could be filed.

8 Then it turns out the defendant declined to
9 go along with that procedure which had been discussed in Court,
10 so we are back to a clean slate in effect.

11 The issues remain as they were as to whether
12 production can be compelled. This is not a case where the
13 Government is indiscriminately picking out a member of the
14 public and asking him to supply anything. The defendant has
15 been indicted by the Grand Jury and the Government has made an
16 adequate showing why they want his fingerprints. They have
17 indicated there has been no challenge that fragments of prints
18 were noted on the note handed to the bank teller and they want
19 a handwriting exemplar to compare with the handwriting on the
20 note. There is no demand beyond what's reasonably required.
21 There is no shadow of a claim that any personal indignity is
22 being visited upon the defendant.

23 There clearly is no self discrimination
24 privilege as to either the fingerprints or exemplars and I
25 just don't think it's the law that unless a Grand Jury asks for

1 this, the Government can.

2 I think the law is quite to the contrary. I
3 think that's been the law before Rule 16 and it's been the law
4 before the amendment of Rule 16 and I think it remains the law
5 after the amendment of Rule 16, is that at least on a showing
6 of reasonable need the Government can obtain from the defendant
7 physical characteristics. They can make him stand up in a
8 courtroom, put on clothing and make him walk and other
9 characteristics of which handwriting exemplars and fingerprints
10 are rather traditional forms.

11 So I will grant the Government's motion and
12 execute this order, and let me explain to the defendant the
13 consequences of this.

14 Come forward, Mr. Evans.

15 I am granting the Government's motion and
16 entering an order that requires you to allow yourself to be
17 fingerprinted and to provide what are called major case finger-
18 prints. That means more than the fingertips but the entire
19 palm, side of the hand, all aspects of your hand and the second
20 part of the order is that you write in your handwriting, your
21 normal handwriting, the words that appear on this order.

22 Now, in view of the fact that there was an
23 indication last week that you declined to do that, let me
24 indicate so there will be no misunderstanding on your part what's
25 involved here. If you refuse to comply with this order, you run

1 the risk that you can be held in contempt of Court and if there
2 should be a contempt proceeding, then certain consequences can
3 flow from that if you are found in contempt.

4 You can be brought back for a hearing before
5 me without a jury and in the event that you are adjudged in
6 contempt, there can be a penalty of up to six months in jail
7 and that penalty can be in addition to whatever penalty there
8 might be if you are ultimately convicted on the charges in this
9 indictment, or it's also possible for the contempt proceeding
10 to be determined by a jury, in which case the penalty can be
11 beyond six months and can be measured in years rather than
12 months and that penalty, too, can be a consecutive sentence to
13 whatever penalty might be imposed on the substantive charges
14 if you are convicted of them.

15 Of course, if you are acquitted of them, then
16 obviously nothing can be consecutive, but I want to be clear
17 with you that if you are convicted of the substantive charges
18 in this indictment, and if there are contempt penalties, either
19 up to six months imposed by a Court or if there should be a
20 jury trial they can be well beyond the six months and measured
21 in years.

22 Those penalties, the contempt penalties can
23 be consecutive to any penalties imposed in the criminal case
24 itself.

25 Do you understand that?

1 MR. EVANS: Yes, I understand.

2 THE COURT: This order may be filed.

3 MR. BOWMAN: May I just inquire of the Court
4 with respect to its order. It says major case fingerprints.
5 What does that include?

6 THE COURT: As I described it to him, it's
7 all aspects of his hand.

8 MR. CUTHBERTSON: We would ask that the hand-
9 writing exemplars be in printed form, not script fashion. The
10 notes were in a block print form. That's the form we would
11 like the handwriting exemplars to be given in.

12 THE COURT: Then perhaps it ought to specify.
13 You mean in printed capitals?

14 MR. CUTHBERTSON: No, no normal print --
15 capital being the first letter and small print the rest as
16 opposed to a script fashion.

17 MR. BOWMAN: Is the Government directing the
18 defendant to write a particular letter in a particular way?
19 If the decision is made that we are going to comply with the
20 Court's order, I want to be sure that we are going to be in
21 compliance. I don't want there to be any --

22 MR. CUTHBERTSON: The specific writing is in
23 the order. "This is a stickup. Get me all your money," written
24 in a -- just as it is typed. In other words, not a script
25 fashion. A printed, handwritten form.

1 MR. BOWMAN: So the record can be clear, you
2 are asking the Court to order the defendant to write, "This is
3 a stickup. Give me all yours money. This is a stickup. Give
4 me the money." Exactly as it appears in this order?

5 MR. CUTHBERTSON: That's correct.

6 MR. BOWMAN: No other way?

7 MR. CUTHBERTSON: That's correct.

8 THE COURT: Well, apparently the main point is
9 that it be in printing rather than script.

10 MR. CUTHBERTSON: That's correct.

11 THE COURT: Then I will make sure the order
12 says of his printed handwriting.

JOHN M. QUINN, called as a witness,
having been first duly sworn by the Clerk, testified as
follows:

THE CLERK: Please state your name and
address.

THE WITNESS: John M. Quinn. 770 Chapel
Street, New Haven.

DIRECT EXAMINATION

BY MR. CUTHBERTSON:

Q Are you employed?

A Yes, I am.

Q How are you employed?

A I'm a special agent with the FBI.

Q How long have you been a special agent with the FBI?

A Approximately seven years.

Q Were you on duty on November 30th, 1976?

A Yes, I was.

Q Did you ask the defendant in this case, David Evans,
to provide you with a complete set of major case fingerprints
on that day?

A Yes, I did.

Q Had you previously identified yourself as a special
agent of the FBI to the defendant?

A Yes.

1 Q On November 30th, 1976, after you asked the defendant
2 for a complete set of major case fingerprints, did he in fact
3 provide you with a complete set of major case fingerprints?

4 A No, he did not.

5 Q Did he provide you with any fingerprints?

6 A No.

7 MR. CUTHBERTSON: I have nothing further,
8 your Honor.

9 CROSS-EXAMINATION

10 BY MR. BOWMAN:

11 Q Agent Quinn, are you the case agent in the case of
12 United States versus David Daniel Evans, which essentially
13 consists of three bank robberies?

14 A There are three bank robberies. The third one I am,
15 yes.

16 Q Are you familiar with the defendant's criminal record?

17 A Yes.

18 Q And do you know whether or not there are other finger-
19 prints of the defendant on file in the State of Connecticut?

20 A Yes, there are.

21 Q And in fact from your view of the defendant's criminal
22 record, the defendant has been fingerprinted many many times,
23 isn't that true?

24 A He has had regular criminal fingerprints taken as
25 opposed to major case fingerprints, yes.

1 2 Have you checked with either the State Police or the
2 prison at Somers or any other law enforcement agency to see
3 whether or not you could obtain palm prints of the defendant
4 from those agencies or whether they are on file?

5 MR. CUTHBERTSON: Your Honor, I will have
6 to object. This seems to me to be irrelevant. Counsel
7 is trying to relitigate something which was decided
8 a few days ago. That is the basis of the authority
9 getting --

10 MR. BOWMAN: We are here in a criminal
11 proceeding to see if the defendant should be punished
12 and I believe that it's relevant for the Court to
13 know whether or not the evidence sought by the
14 Government through the person of the defendant could
15 have been obtained through any other source.

16 THE COURT: Overruled.

17 MR. BOWMAN: Repeat the question.

18 A I think you wanted to know if I checked with the
19 State Police or the prison at Somers to see if they had major
20 case fingerprints on file.

21 Q Palm prints.

22 A No, I have not.

23 Q Is there a reason for that?

24 A I have not had the opportunity and I wanted to -- I
25 know I did not. I need -- I did not have the opportunity and I

1 wanted to take my own since I did not -- I was not aware of any
2 other palm prints being on file.

3 Q You never made a search to determine whether or not
4 anybody else had any palm prints of David Evans on file, did you?

5 A No, I did not.

6 Q Do you know whether any other agents of the FBI did?

7 A No, I do not.

8 Q The same day that the defendant refused to give you
9 palm prints, he gave you handwriting exemplars, is that true?

10 A Yes, he gave me a sample of his handwriting.

11 Q Were you aware that when the defendant was brought to
12 Court for arraignment, that he provided the United States Marshal
13 with a set of fingerprints?

14 A I was aware that he had provided him with a set of
15 regular criminal fingerprints.

16 Q What is the difference between the fingerprints -- the
17 prints that you want from the defendant and the prints that the
18 defendant gave to the Marshal on the day of his arraignment?

19 A There is a -- quite a bit of difference in terms of
20 the overall amount of print that we take. Specifically the
21 prints that the Marshal takes are direct prints of just part of
22 the fingers. The flat portion of the bottom of the fingers. What
23 I was interested in obtaining was, as I have named them, major
24 case prints which would be a set of palm prints which would be
25 rolled over a plain piece of card and also would be the sides of

each finger and the tip of each finger.

Q In fact, you don't know if those prints have or have not been previously obtained from the defendant by other authorities, do you?

A I did not know that.

Q Were you aware that a Grand Jury investigation was proceeding during the middle of November in the expectation that an indictment would be obtained charging the defendant with violation of the bank robbery statute?

MR. CUTHBERTSON: I will object again.
This is irrelevant to the question at hand.

MR. BOWMAN: I claim it, your Honor, only to see whether or not any request was made through the United States Attorney's Office to the Grand Jury to compel the defendant or to subpoena the defendant to see whether or not he would give fingerprints at that time.

THE COURT: I think he can make his record on that point.

A I was aware that the facts concerning the bank robbery in which Mr. Evans was charged, to be charged, was presented to a Grand Jury and was in fact presented, yes.

Q Did you testify during those proceedings?

A No, I did not.

Q Did another agent testify?

A Yes.

1 Q Was that Agent Cotton?

2 A Yes.

3 Q Do you know whether or not he made any request of
4 Mr. Cuthbertson or anyone else of the United States Attorney's
5 Office that a subpoena issue for Mr. Evans so that physical
6 characteristics could be taken from him pursuant to a Grand
7 Jury subpoena?

8 A No.

9 Q No request was made?

10 A No request was made.

11 Q Was there some reason for that or was it that you just
12 didn't think of it?

13 A I think possibly we had not reached the point yet that
14 we realized that these would be useful. We were trying to compile
15 the facts of three bank robberies that had followed quite closely
16 behind each other and among our other duties we did not have the
17 opportunity to realize we might need this yet.

18 Q In terms of the evidence you already have against the
19 defendant, is it true that you have already identified one of his
20 fingerprints on one of the demand notes used, alledgely used in one
21 of the robberies?

22 A Yes. They have been identified by -- they have been
23 identified on one note. A print has been positively identified.

24 Q Is it one print on one note?

25 A One print has been identified on one note.

1 Q Is there some reason with respect to this particular
2 case that you want the palm prints?

3 A Yes.

4 Q What is that?

5 A We are also interested in comparing some partial palm
6 p rints and what are believed to be partial fingerprints, latent
7 fingerprints which were found at the crime scene with Mr. Evans'
8 full palm and fingerprints which are classified major case prints.

9 Q These prints, these fingerprints are -- what you call
10 partial prints?

11 A Yes.

12 Q Have you made an attempt to compare the fingerprints
13 given by Mr. Evans to the United State Marshal with those partial
14 prints found at the crime scene?

15 A An attempt has been made as far as I know.

16 Q And do you know whether or not an identification was
17 able to be effected?

18 A This attempt was -- these prints were obtained by the
19 New Haven Police Department. I do know, according to the people
20 that I have talked to there, that they do not have a set of major
21 case fingerprints and therefore, they have been unable to make
22 a valid comparison. I know they have attempted to.

23 Q Do you know whether or not their failure to make a
24 valid comparison is a result of the known prints of the defendant
25 being in some way smudged or improperly taken or is the failure

1 MR. CUTHBERTSON: Nothing from the Government.

2 MR. BOWMAN: We don't have any evidence.

3 May I be heard?

4 THE COURT: Yes.

5 MR. BOWMAN: Your Honor, this is a show cause
6 proceeding as to why the defendant should not be held in criminal
7 contempt of Court by refusing to comply with the Court's order
8 that he give major case prints.

9 With respect to the nature of the proceedings,
10 the criminal contempt proceeding, it is the defendant's position
11 that under Shillitani versus United States, 384 U.S. 364 1966,
12 the Supreme Court has held that in a situation analogous to this
13 one, that a Court must exercise the least possible power adequate
14 to the end proposed, and proposed is to compel the defendant to
15 give his fingerprints.

16 The nature of civil contempt is essentially
17 coercive or remedial. It is not a situation where the defendant
18 has done something the Court has forbidden him to do. It is
19 rather that he has failed to do what the Court has ordered him to
20 do.

21 He is a person who is presently in prison in
22 lieu of \$20,000 bond set by your Honor. He cannot make this bond
23 because he is poor. The Government I assume has not sought civil
24 contempt proceedings because they feel that since the defendant
25 is already in jail there can be no coercion which would be

1 meaningful by the imposition of a prison sentence pursuant to
2 civil contempt, so that it can be argued, and it is argued by the
3 defendant, that if the defendant were not poor or were released
4 on bail, that this Court under Shillitani would impose a term of
5 imprisonment to coerce the defendant into giving fingerprints
6 which presumably he could perjure himself of upon the giving of
7 those fingerprints or after the trial of the case is already over.
8 Under Cheff versus Schunckenberg.

9 So really the fact that we are here in a
10 criminal proceeding I would respectfully submit is because the
11 defendant is indigent. I can understand the Government saying,
12 well, it's really no compulsion seeing as we do have the 60-day
13 Rule here in this Court and the defendant at the most is risking,
14 although I think it's a substantial burden and detriment to him,
15 that the 60 days between arraignment and trial would be dead time
16 in any event and I think that is enough of a punishment were this
17 to be a civil proceeding, but nevertheless because he has been--
18 because a bond has been set, with or without good reason, I'm not
19 challenging the fact that bond has been set in that amount. Never-
20 theless the fact that this is not a civil proceeding and the fact
21 that it is a criminal proceeding is merely because the defendant
22 cannot make bond and, therefore, because of his indigency is
23 facing criminal charges whereas if he were not poor I respectfully
24 suggest under Shillitani he would not be and, therefore, I ask
25 the Court not to impose any criminal punishment upon the defendant

1 but rather if the Court feels that some coercion is necessary in
2 this case and if the Court feels that the Government has made an
3 adequate showing to warrant the imposition of a civil penalty under
4 the civil contempt power of this Court inherent in the Court's
5 jurisdiction, that it be one that the defendant can perjure him-
6 self from and one that he could have perjured himself from and
7 would be facing if he were not poor and were not indigent, and I
8 feel that if he is found in criminal contempt, is really being
9 denied the equal protection of the law by virtue of his economic
10 status.

11 THE COURT Well, the first issue is whether
12 the defendant is in violation of the Court's order issued November
13 29th which directed him to provide agents of the FBI with a set of
14 his major case fingerprints. The evidence is undisputed that on
15 November 30th he was asked to supply those prints in conformity
16 with the Court's order and he refused to do so and he makes no
17 claim today that he is willing to do so, so the violation of the
18 order is clear.

19 The claims are already on the record as to
20 whether the order is proper. I won't repeat what I said when the
21 order was issued except to observe again that the evidence fully
22 supports the Government's position that this defendant is not
23 being singled out arbitrarily and being asked for his case prints.

24 There is a substantial basis to secure further
25

1 evidence from this defendant. It is not evidence that is pro-
2 tected by the Fifth Amendment nor is it evidence, the giving of
3 which would subject him to any personal indignity such as might
4 raise the right of privacy issues.

5 So the failure to abide by the order is clear
6 and the defendant is in contempt of that order. Whether the
7 contempt should be considered civil or criminal does raise a
8 somewhat novel question.

9 I think defense counsel is right to an extent
10 in suggesting that the circumstances of the defendant's bond,
11 which in turn, or the circumstances of his inability to meet his
12 bond, which in turn stems from his economic circumstances, have
13 some bearing on what happens.

14 I don't think that necessarily amounts to
15 equal protection of the laws, not every variation of a person's
16 financial circumstances necessarily implicates the equal pro-
17 tection clause.

18 If a person comes before the Court charged
19 with the same offense as Mr. Evans, who had available to him a
20 million dollars, that person would probably not be deterred from
21 flight by the risk of forfeiting \$20,000 and so his bond would
22 probably be a lot higher than Mr. Evans solely because of his
23 income so there are variations that happen because of wealth
24 and they don't always offend the equal protection clause.

25 I think the purposes of deciding whether under

Shillitani civil contempt is a remedy likely to bring about compliance with the order, I am entitled to take the situation as it now exists which is that the defendant is in custody under a bond and which I think is reasonable under the circumstances, and under those circumstances I think it is totally unrealistic to think that a civil contempt order which simply tells him to remain in custody until he gives the major case prints and an order which would then expire upon the trial because after the trial there would be no purpose to be served by such a coercive order, that type of order is totally unlikely to have any prospect of bringing about compliance with the order that's been violated, and in those circumstances it seems to me appropriate to therefore use the procedure of criminal contempt so that the defendant understands a penalty and a fixed penalty faces him in the event his contumacious conduct persists.

He was advised that at time the order was signed that he faced the possibility of a criminal contempt penalty which indeed could be consecutive to any penalties that might arise on the underlying criminal charge, and that prospect still faces him.

I think the way I will resolve the matter is this. For the reasons I've already given, I find that he is in contempt of the order of November 29th, 1976 and he is in criminal contempt of this Court and is so adjudicated to be in criminal contempt of this Court's order of November 29th.

1 I think this frequently happens when contempt
2 arises during the course of criminal prosecution it would be
3 appropriate to defer consideration of the appropriate penalties
4 until conclusion of the criminal proceedings.

5 I don't in any way intend to alter the nature
6 of contempt from civil to criminal contempt but I will observe
7 that just as with any criminal charge that a defendant who elects to
8 take any steps of a mitigation nature is always entitled to have
9 those steps considered in his favor when the time comes to select
10 a penalty.

11 So if there should be compliance between now
12 and the time of disposition of his criminal contempt, that would
13 naturally stand in the defendant's favor when it came time to
14 select a penalty but I want to be very clear on the record that
15 I am not thereby making this a civil contempt in the sense that
16 the contempt is conditional. It is not conditional. It is an
17 absolute finding of contempt and the contempt finding being
18 criminal will not be set aside even in the event of compliance
19 because it is a criminal contempt and it is not the coercive type
20 of civil contempt but the penalty to be determined will naturally
21 be selected depending upon the circumstances as they appear at the
22 time of sentencing on the contempt charge.

23 As I have indicated, I will defer imposition
24 of the penalty until the conclusion of the underlying criminal
25 case.

* * *

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1 situation. This particular offense did not involve any violence
2 or threat of violence against any person, but that has occurred
3 in the past and it's just an open question whether when you
4 complete a sentence on this charge you are going to lead a law-
5 abiding life or whether someone else is going to be in a situation
6 where some serious threat will be carried out against them, but
7 I am reluctant to sentence you for an extended length of time
8 because there is some realistic prospect that something is going
9 to change.

10 So I will impose a sentence that does,
11 hopefully, place you in Lexington, and take some chances although
12 there will be an extensive probationary period after your
13 sentence.

14 I will impose sentence on all of the matters
15 that are pending. On Count One it is the sentence of the Court
16 that the defendant is committed to the custody of the Attorney
17 General for two years.

18 MR. BOWMAN: Is that Count Four, your Honor?

19 THE COURT: It's listed here as One.

20 MR. BOWMAN: The Counts are Count Four and
21 Six.

22 THE COURT: It's just listed as the first
23 and second Counts here. With respect to the indictment you are
24 quite right. Count Four is the first of the two Counts.

25 So with respect to Count Four, it is the

1 sentence of the Court that the defendant is committed to the
2 custody of the Attorney General for two years.

3 With respect to Count Six of the indictment,
4 the defendant is committed to the custody of the Attorney General
5 for ten years, execution suspended and he be placed on probation
6 for five years, the probation to commence after service of all
7 sentencing in connection with this case and with respect to the
8 criminal contempt.

9 While I appreciate that you assert a right of
10 privacy, I frankly cannot accept that claim as a valid defense.
11 It seems to me the far more likely inference and understandably
12 one is that you simply felt that there was a greater chance of
13 associating you with these offenses if they have the full finger-
14 prints rather than the partials and I can appreciate your
15 thinking that otherwise it is unlikely they would have wanted
16 the full fingerprints, and the law is quite clear that you are
17 obliged to furnish those prints and you failed to, and I will
18 impose a penalty in relation to that criminal contempt.

19 With respect to the criminal contempt that
20 has been previously adjudicated, the defendant is committed to
21 the custody of the Attorney General for six months and that
22 sentence consecutive to the sentence imposed on Count Four.

23 Do you understand?

24 MR. EVANS: Yes.

25 THE COURT: The aggregate sentence is two and

1 a half years to be followed by a five-year probation period
2 during which time there will be a suspended sentence of ten
3 years.

4
5 And I will recommend that the place of
6 incarceration be the Federal Correctional Institution at
7 Lexington and I will ask the Marshal to maintain the defendant
8 in this District for one week.

9 MR. CUTHBERTSON: The Government is filing a
10 motion to dismiss Counts One, Two, Three and Five of the
11 indictment in this case.

12 * * *